SUPREME COURT, U. S.

No. 74-667

Supreme Court, U. S.
FILED
NOV 29 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

FRANK A. ANGLIN, JR.,

Petitioner,

vs.

STEVEN JOHNSTON, Parole Executive, United States Board of Parole, NORMAN CARLSON, Director, Bureau of Prisons, and JOHN TWOMEY, United States Marshal, Northern District of Illinois,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Frank A. Anglin, Jr., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the denial of the petition for a writ of habeas corpus and order entered by the United States District Court for the Northern District of Illinois.

OPINION BELOW

The opinion of the Court of Appeals is printed as the Appendix of the Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on November 1, 1974. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTION PRESENTED

1. May the district court enter an order suspending service of a pending federal sentence and order the prisoner to serve an intervening civil contempt sentence for his refusal, despite immunity, to testify before a grand jury?

NATURE OF THE CASE

Petitioner sought a writ of habeas corpus to test the validity of a ruling by the United States Board of Parole that denied him credit for service of time on a previously imposed criminal sentence while he was being simultaneously imprisoned for contempt as a result of his refusal to answer grand jury questions after having been granted immunity. There is no challenge to the jurisdiction of the District Court nor are the facts in dispute.

STATEMENT OF FACTS

On February 23, 1972, the Petitioner was sentenced by Judge Frank J. McGarr to three years imprisonment for violation of Title 18, United States Code, Section 659. This sentence was subsequently modified to be served pursuant to Title 18, Section 4208(a)(2). On March 27, 1973 Petitioner began service of this sentence at the Federal Correctional Institution at Sandstone, Minnesota.

In May, 1973, Petitioner was returned to the Northern District of Illinois pursuant to a Writ of Habeas Corpus *ad testificandum* requested by the United States Attorney. He was subsequently granted immunity from prosecution pursuant to Title 18, Section 6002, *et seq.* Petitioner was then brought before the special 1972 Grand Jury and asked questions relating to the case in which he had previously been found guilty and for which he was serving a sentence.

The Petitioner refused to answer questions, was held in contempt of the Grand Jury by Chief Judge Robson and committed to the custody of the marshal for incarceration at the Cook County Jail until such time as he obeyed the order arising out of the grant of immunity.

In December, 1973, Petitioner wrote the United States Board of Parole requesting that he be allowed a hearing regarding his eligibility for parole under the original sentence for which he had been committed. The Parole Executive informed Petitioner that his criminal sentence had been suspended for the duration of the contempt sentence and that the time spent serving the contempt sentence would be inoperative on any other sentence being served. (R. 1, Exhibit A).

Petitioner then filed his application for a Writ of Habeas Corpus seeking the following relief:

(a) an opportunity to appear before the Board of Parole as is his right under Title 18, Sec. 4208 (a)(2);

(b) Credit for the time he has spent in the Cook County Jail (since the time he was brought to the Northern District of Illinois pursuant to the writ of habeas corpus *ad testificandum*) against the sentence imposed by Judge McGarr;

(c) Petitioner's return to Sandstone for service of the remainder of the sentence imposed by Judge McGarr and for service of commitment order entered by Chief Judge Robson.

The Petition was denied in every respect and an appeal followed.

The Court of Appeals affirmed the district court's holding and this Petition followed.

REASONS FOR GRANTING CERTIORARI

I.

NEITHER A DISTRICT COURT JUDGE IMPOSING A CONTEMPT SENTENCE UNDER TITLE 28, SECTION 1826, NOR THE BUREAU OF PRISONS CAN SUSPEND A SENTENCE PROPERLY IMPOSED UNDER TITLE 18, SECTION 3568.

In this case of first impression (deemed to pose a "novel question" by the appellate court, App. 1) the petitioner was serving a criminal sentence imposed prior to the contempt citation. Title 18, U.S.C. Section 3568 provides, in relevant part:

> The sentence of imprisonment of any person convicted of an offense shall begin to run from the date on which such person is received at the penitentiary, reformatory or jail for service of such sentence. . . .
>
> * * *
>
> No sentence shall prescribe any other method of computing the term.

There is nothing in the wording of this section to grant a federal judge the authority to suspend or hold in abeyance the sentence of any person after he has begun his period of incarceration.

This statute—Section 3568—being criminal in nature, must be strictly construed. In *United States* v. *Resnick*, 299 U.S. 207, 209 (1936), the court held that criminal statutes "are to be strictly construed in favor of the accused; they may not be held to cases not covered by the

words used." In *United States* v. *Boston & Maine R.R.*, 380 U.S. 157, 160 (1965), the court applied this rule to the Clayton Act and discussed its origin:

> A criminal statute is to be construed strictly not loosely. Such are the teachings of our cases from *United States* v. *Wiltberger*, 5 Wheat. 76, [1820], down to this day. Chief Justice Marshall said in that case:
>
> > "The rule that penal laws are to be construed strictly, is, perhaps, not much less old than construction itself. It is founded on the tenderness of the laws for the rights of individuals; and on the plain principle that the power of punishment is rested in the legislative, not in the judicial department." *Id.* p. 95.

See also, *United States* v. *Enmons*, 410 U.S. 396, 411 (1973), and cases cited therein, where the court stated, ". . . this being a criminal statute, it must be strictly construed, and any ambiguity must be resolved in favor of lenity."

The statute under which the Chief Judge imposed the penalty of confinement until Petitioner answered grand jury questions was Title 28, Section 1826(a), which states in pertinent part as follows:

> (a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No

> period of such confinement shall exceed the life of—
>
> (1) the court proceeding, or
>
> (2) the term of the grand jury, including extensions,
>
> before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

Had Congress wished Section 1826 to provide for the suspension of a previously imposed sentence it should have explicitly provided therefore. See *Donnelley* v. *United States*, 276 U.S. 505, 512 (1928) in which the court affirmed the conviction of the Prohibition Director for Nevada under the National Prohibition Act, even though his particular omission was not enumerated as a crime. The court supported its decision by the fact that Congress had provided, within the act itself, for its liberal construction in order to effectuate its specified purpose. Congress has neither provided for liberal construction nor expressly enunciated the purposes of the statutes relevant to this appeal.

While it is true that a criminal statute should not be construed to defeat its *obvious* purpose, *United States* v. *Braverman*, 373 U.S. 405, 408 (1962), criminal statutes should not be interpreted to depart from their plain meaning and context. *Pierce* v. *United States*, 314 U.S. 306, 311-312 (1941); *United States* v. *Clark*, 412 F.2d 885, 890 (5th Cir. 1969). The applicability of a criminal statute cannot be enlarged by judicial construction beyond the language used in the statute. *United States* v. *Fisher*, 456 F.2d 1143, 1145 (10th Cir. 1972).

It is obvious, then, that Section 3568 cannot be construed to give a federal judge the power to suspend or

hold in abeyance a validly imposed sentence which has been partially served.

Nor does Rule 35 of the Federal Rules of Criminal Procedure, provide the needed grant of authority to a federal judge. That rule is applicable to the correction of an illegal sentence or, within time limits, to the reduction of a sentence. Since this case presents neither an illegal original sentence nor a reduction in Petitioner's period of incarceration, Rule 35 cannot be relied upon by Respondents in this case.

The sole basis for the court's conclusion that Petitioner's sentence should be held in abeyance, is the alleged intent of Congress in passing the immunity statute. The district court stated in its Memorandum Opinion and Order:

> . . . The granting of petitioner's requests herein would remove the incentive in contravention of congressional intent. The petitioner would suffer no detriment for his refusal to testify and 28 U.S.C. Sec. 1826(a) would have no meaning. Thus, to effectuate the clear intent of this law, the petitioner's request must be denied. (R. 9, pp. 2-3)

But, where is the "clear intent" of which the district court speaks? The government in its Answer admitted that there is no explicit mention in the legislative history of holding a criminal sentence in abeyance while a federal prisoner is being confined for civil contempt (R. 7, p. 4). Neither is there any evidence whatsoever of such congressional intent in the legislative proceedings concerned with the statute. Neither the court nor the government offered anything in the legislative history which addressed itself to the specific issue framed by this appeal.

The fact that Congress may have committed an oversight in not providing for the situation of an incarcerated

person being held for civil contempt does not give the court the power to create a new pattern of punishment. It is a well established rule that in federal court one may not be held guilty of an offense which a statute has omitted, though by inadvertence, to define and condemn. *Viereck* v. *United States*, 318 U.S. 236, 245 (1943).

By the same token, the authority to define and fix punishment for crime is legislative, not judicial, in nature. *United States* v. *Jones*, 438 F.2d 461 (7th Cir. 1971). As a result, one may be subjected to punishment in federal courts only if that punishment is authorized by Congress. *United States* v. *Gill*, 204 F.2d 740, 742 (7th Cir. 1953), *cert. den.* 346 U.S. 825. One cannot be subjected to a penalty unless the words of the statute plainly impose it. *United States* v. *Campos-Serrano*, 404 U.S. 293 (1971); *Zaimi* v. *United States*, 467 F.2d 511 (D.C. Cir. 1973). Thus, the court, by suspending Petitioner's sentence was exercising purely legislative authority outside the bounds of valid judicial discretion. See *United States* v. *Evans*, 333 U.S. 483 (1948).

The only real intent shown by the legislative history of the immunity statute was that it was to "codify present practice." H. Rep. No. 91-1549, 91st Cong., 2d Sess. 1970 U.S. Code & Administration News 4007, 4008. Prior to the enactment of the statute, the practice employed in the case of an incarcerated witness given immunity was to hold him in *criminal* contempt for his refusal to answer proper questions. In the case of *In re Proceedings Before the 1959 Grand Jury*, 212 F. Supp. 823 (N.D. Ill. 1963), an incarcerated witness who refused to testify before a grand jury after receiving a grant of immunity was sentenced to eighteen months for criminal contempt to run consecutively to the sentence he was then serving. This

practice was approved in *Piemonte* v. *United States*, 367 U.S. 556 (1961), and is still appropriate today. There is no evidence whatsoever of any intent by Congress to provide for orders such as the one appealed from as a substitute or alternative to that practice.

Further, there is no authority to suggest that suspending the sentence of a federal prisoner while he is being held for contempt was ever a part of the law prior to the enactment of this legislation. Thus, in no manner can "present practice" be said to support the order appealed from.

It has been held that criminal statutes should not be extended to cover cases merely because it may seem to the court that Congress would have done well to have included them. *Ventimiglia* v. *United States*, 242 F.2d 620, 623 (4th Cir. 1957). Thus, since there is no language in the relevant statutes nor any evidence of the intent of Congress to make the statutes apply to this type of case, the order of the district court must be reversed.

II.

ABSENT STATUTORY AUTHORIZATION, NEITHER THE DISTRICT COURT JUDGE NOR THE BUREAU OF PRISONS CAN SUSPEND OR HOLD IN ABEYANCE A SENTENCE PARTLY SERVED WHILE THE PRISONER SERVES AN INTERVENING CIVIL CONTEMPT TERM.

Since there is no statutory authority, either expressed or implied, for the order appealed from, the order by its terms runs afoul of the long-standing rule in this country that a court is powerless to increase a valid sentence where the punishment has already been partly served. *Smith* v. *United States*, 297 F. Supp. 131 (W.D. Mo. 1968).

In *Egan* v. *United States*, 268 F.2d 820 (8th Cir. 1959), *cert. den.* 361 U.S. 868, defendant was convicted of robbery and kidnapping, along with three other defendants. Defendant was sentenced to life imprisonment while the other three received fifteen, twenty, and twenty-five years, respectively. After serving twenty-three years, defendant sought to have his sentence vacated. The court refused, stating at page 823:

> While the court may correct an illegal sentence at any time (Rule 35 of the Rules of Criminal Procedure, 18 U.S.C.A.), the beginning of the service of the sentence in a criminal case ends the power of the court to change it. *Ex parte Lange*, 18 Wall. 163, 85 U.S. 163, 21 L.ed. 872; *United States* v. *Murray*, 275 U.S. 347, 358, 48 S. Ct. 146, 72 L.ed. 309.

In *Rutledge* v. *United States*, 146 F.2d 199 (5th Cir. 1944), an attempt to turn a validly imposed concurrent three year sentence for escape into a consecutive three year sentence to begin at the termination of the sentence being served was reversed since defendant had begun to serve the concurrent sentence when the alteration was attempted.

In *Crowe* v. *United States*, 200 F.2d 526 (6th Cir. 1952), defendant was sentenced to one year on Count I, three years on Count II, and five years on Count III; Counts II and III to run concurrently with each other and consecutively to Count I. After serving the year, defendant was paroled. Seven months later parole was revoked and he was ordered to serve the remaining five years, originally a valid sentence on Count III. Since this new sentence would now end at a later date than would have the original one, the Court of Appeals reversed the order, holding at 200 F.2d at 529:

> . . . The order of judgment . . . is invalid because it increases the sentence imposed originally on the second and third counts. *Frankel* v. *United States,* 131 F.2d 756. This court there held that it is not within the power of the court to increase a sentence where punishment has already been partly suffered under the original sentence.

See also, *Sullens* v. *United States,* 409 F.2d 545 (5th Cir. 1969) and *Owensby* v. *United States,* 385 F.2d 58, 60 (10th Cir. 1967).

The Seventh Circuit Court of Appeals, in the recent case of *United States* v. *Teresi,* 484 F.2d 894 (7th Cir. 1973), applied the same rule in holding that the regular judge could not vacate the order of a substitute judge, validly entered, on defendant's emergency motion which placed defendant on conditional probation. The court stated at 899:

> . . . No more onerous sentence could be imposed once defendant began to serve his period of probation.
>
> "It is a well settled general rule that increasing a sentence after defendant has commenced to serve it is a violation of the constitutional guaranty against double jeopardy." *United States* v. *Sacco,* 367 F.2d 368, 369 (2nd Cir. 1966), and cases cited therein.

There is no question but that the order appealed from has the effect of increasing the total time, from the date of incarceration to the last date of the sentence, which Petitioner would have to serve on his original conviction. This was invalidated in the *Crowe* case, *supra,* and likewise should have been reversed here.

It may be argued that the general rule is subject to the exception that a sentence may be held in abeyance due to some fault of the prisoner himself. This is certainly

true where the prisoner has escaped from custody or is guilty of some misconduct as a prisoner while imprisoned. However, in the authority cited by the government in its Answer in support of this proposition, the cause of the suspension was some act or acts of the inmate which occurred *directly in relationship to the sentence he was then serving.*

The Court of Appeals for the Seventh Circuit based its holding on what it termed "analogous situations where the sentence for a criminal offense has been held to be or not to be suspended for the duration of an intervening event." (App. 5) These events were an intervening state sentence served while the prisoner was on parole, a second federal sentence spent while on parole, escape, revocation of probation, freedom on bail bond or one's own recognizance, freedom on bail pending appeal and denial of bail of a state prisoner due to a federal detainer being lodged against him, (App. 5-8).

While none of the Appellate Court's examples were incorrect, they did not meet the issue of whether an act *not related to the original sentence* could serve to toll the time spent serving that sentence. Violation of parole, escape, and probation violations directly concern the terms and conditions of the sentence which is then deemed to be held in abeyance. Freedom on bail and recognizance occur prior to the instant situation. Freedom on bail pending appeal, when it occurs after service of the sentence has begun, reflects a conscious choice by the appellant to voluntarily suspend serving his sentence in order to challenge the validity of the sentence being suspended. In each of these instances the reason for the suspension did not relate to anything beyond the terms of the sentence which was suspended.

The instant case is totally different. Petitioner's conduct which resulted in the civil contempt was in no way

related to his conduct as a prisoner under the original sentence. Petitioner was not guilty of escape nor can it be said that he engaged in any misconduct while an inmate at the Federal Correctional Institution at Sandstone, Minnesota.

In holding that a validly imposed sentence, partly served, can be suspended due to conduct of the prisoner which in no manner relates to such sentence stretched the exception far beyond any previous application. This the court should not have done.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully submits that a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX

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In the

United States Court of Appeals

For the Seventh Circuit

No. 74-1509

FRANK A. ANGLIN, JR.,

Petitioner-Appellant,

v.

STEVEN JOHNSTON, Parole Executive, United States Board of Parole, NORMAN CARLSON, Director, Bureau of Prisons, and JOHN TWOMEY, United States Marshal, Northern District of Illinois,

Respondents-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 74 C 1061
FRANK J. McGARR, *Judge.*

Argued September 13, 1974 — Decided November 1, 1974

Before SWYGERT, *Chief Judge,* FAIRCHILD and SPRECHER, *Circuit Judges.*

SPRECHER, *Circuit Judge.* This appeal from the denial of a petition for a writ of habeas corpus poses the novel

question of whether a pending federal sentence may be suspended in order to allow the prisoner to serve an intervening civil contempt sentence for his refusal, despite immunity, to testify before a grand jury.

I

The petitioner, Frank A. Anglin, Jr., was found guilty by a jury on January 10, 1972 of two counts of theft from an interstate shipment and illegal use of firearms. On February 23, 1972 he was sentenced by Judge McGarr to concurrent sentences of three years and one year and on March 19, 1973, the sentence was modified to be served pursuant to 18 U.S.C. § 4208 (a)(2). On March 27, 1973, petitioner began to serve this sentence at the Federal Correctional Institution at Sandstone, Minnesota.

In May, 1973, petitioner was returned to the Northern District of Illinois pursuant to a petition for a writ of habeas corpus *ad testificandum* requested by the United States Attorney. On June 20, 1973, he was granted immunity and brought before the special 1972 grand jury and asked questions which he refused to answer. On June 20, petitioner was adjudged in contempt of court by Judge Robson and committed to the custody of the United States marshal until such time as he should obey the order. Petitioner was incarcerated in the Cook County, Illinois jail pursuant to the civil contempt order, where he remains at the present time.

On April 17, 1974, petitioner filed his application for writ of habeas corpus seeking an opportunity to appear before the Board of Parole, credit against his criminal sentence for time served pursuant to his contempt commitment, and his return to Sandstone for concurrent service of the two sentences.

Upon the government's motion, Judge Robson entered an order on May 1, 1974, stating that the court's "intention was that any time served by . . . Frank A. Anglin, Jr., for civil contempt was not to be counted toward the service of his criminal sentence. . ." and

> It is further ordered that while . . . [Anglin] is confined pursuant to this order his criminal sentence . . . shall be and hereby is ordered suspended and held in abeyance.

In the meantime petitioner had been advised by the Board of Parole of the Bureau of Prisons' Policy Statement 7300.92, issued November 13, 1973, which provides in part:

> 3. c. If the federal criminal sentence is being served when the civil contempt sentence is ordered, the criminal sentence will be suspended for the duration of the contempt sentence. The criminal sentence will be recorded as inoperative for this period.
>
> (1) The time spent serving the contempt sentence will be inoperative on any other sentence being served. Bureau facilities will be responsible for obtaining inoperative time data from marshals for sentence computation purposes.
>
> • • •
>
> d. Time spent serving civil contempt sentences will not be custody as contemplated by 18 U.S.C. 3568.

On May 31, 1974, Judge McGarr denied the petition for writ of habeas corpus, stating:

> To afford the petitioner the relief he requests would be to render Chief Judge Robson's contempt citation meaningless and inoperative. The "recalcitrant wit-

ness" statute, Title 28 U.S.C. §1826 (a) has been upheld under constitutional attack, *Stewart* v. *United States* (9th Cir. 1971), 440 F.2d 954, affirmed 92 S. Ct. 1653; 406 U.S. 441, 32 L.Ed.2d 212, rehearing denied 92 S.Ct. 2478, 408 U.S. 931, 33 L.Ed.2d 345, and clearly authorizes the Court to confine a recalcitrant witness as an incentive to compel the testimony sought. The granting of the petitioner's requests herein would remove the incentive in contravention of congressional intent. The petitioner would suffer no detriment for his refusal to testify and 28 U.S.C. §1826(a) would have no meaning.

Anglin v. *Johnston*, 378 F. Supp. 750, 751 (N.D. Ill. 1974).

II

Petitioner's confinement for civil contempt was authorized by 28 U.S.C. § 1826(a), which is silent as to the effect of such confinement upon pending criminal sentences.[1]

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[1] 28 U.S.C. § 1826 (a) provides:

Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

(1) the court proceeding, or

(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

Petitioner has relied principally upon 18 U.S.C. § 3568, which provides in part:

> The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary . . . for service of such sentence. *The Attorney General shall give* any such person *credit* toward service of his sentence *for any days spent in custody in connection with the offense or acts for which sentence was imposed. As used in this section, the term "offense" means any criminal offense.* . . . (Emphasis added.)

The language of section 3568 is unambiguous. Credit shall be given for time spent "in connection with the offense or acts for which sentence was imposed" and "offense" is defined as a "criminal offense." The confinement for which petitioner seeks credit was imposed in connection with a civil contempt (refusal to testify) and not in connection with the criminal offense "for which sentence was imposed" (theft from interstate shipment and illegal use of firearms). Hence the language of section 3568 does not support petitioner. The parties have not directed us to any pertinent legislative history relative to either section 3568 or 28 U.S.C. § 1826(a) nor have we discovered any which would tend to solve the issue on appeal.

We must look to analogous situations where the sentence for a criminal offense has been held to be or not to be suspended for the duration of an intervening event.

In *Anderson* v. *Corall*, 263 U.S. 193 (1923), the Supreme Court held that a paroled prisoner who served a state sentence before his parole was revoked was not entitled to credit for either the time that he was free on parole or while serving the state sentence.

In *Zerbst* v. *Kidwell*, 304 U.S. 359 (1938), the Court similarly held that prisoners were not entitled to credit for either time spent while free on parole or while serving sentences for the commission of second federal offenses, at the termination of which they resumed serving the balance of the original sentences.

However, the statute providing for the retaking of a parole violator expressly states that "[t]he unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the custody of the Attorney General . . . , and the time the prisoner was on parole shall not diminish the time he was sentenced to serve." 18 U.S.C. § 4205.

Both *Anderson* and *Zerbst* noted that the subject prisoners' "status and rights were analogous to those of an escaped convict." *Anderson*, *supra* at 196; *Zerbst*, *supra* at 361. In *Anderson* the Court added that "[e]scape from prison interrupts service, and the time elapsing between escape and retaking will not be taken into account or allowed as a part of the term." 263 U.S. at 196; *see also Theriault* v. *Peek*, 406 F.2d 117 (5th Cir. 1968), *cert. denied*, 394 U.S. 1021 (1969).[2]

The federal escape statute, (18 U.S.C. § 752), as does the recalcitrant witness statute, (28 U.S.C. § 1826 (a)), fixes a penalty for the offense without stating the effect of that penalty upon pending criminal sentences.

---

[2] Similarly, upon an application for a writ of habeas corpus in the federal district court by a state prisoner, the Court of Appeals affirmed the denial of the writ, holding that a state sentence is tolled by escape and time does not resume running until the prisoner is returned to the state prison. *Phillips* v. *Dutton*, 378 F.2d 898 (5th Cir. 1967).

When probation is revoked, time spent on probation cannot, in the absence of an express order so providing, be credited on a previously imposed sentence. *United States* v. *Hawkins*, 492 F.2d 771 (5th Cir. 1974); *Baber* v. *United States*, 368 F.2d 463 (5th Cir. 1966); *Thomas* v. *United States*, 327 F.2d 795 (10th Cir. 1964); *United States* v. *Guzzi*, 275 F.2d 725 (3d Cir. 1960). The refusal to credit probation time against the prison sentence is not double jeopardy. *Kaplan* v. *Hecht*, 24 F.2d 664, 665 (2d Cir. 1928). This is true although a prisoner on probation is "not a free man, but . . . [is] undergoing punishment and restraint in execution of the judgment of conviction. . . ." *Id.*

The probation statute, 18 U.S.C. § 3653, unlike the parole statute, is silent as to the effect of probation time on the prison sentence upon revocation of probation, but does provide that "the court may revoke the probation and require . . . [the probationer] to serve the sentence imposed, or any lesser sentence, and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed."[3] 18 U.S.C. § 3653.

Freedom on bail bond or on one's own recognizance subsequent to arrest and prior to conviction is not to be credited upon the ultimate sentence even though under

[3] Another variation is that of a prisoner who is granted conditional release at the end of his term less time deducted for good conduct, pursuant to 18 U.S.C. § 4163, then violates the terms of release and is retaken. He is required to serve the remainder of his sentence and the time spent between discharge and retaking is not credited in diminution of his sentence. *Garnett* v. *Blackwell*, 423 F.2d 1211 (5th Cir. 1970). However, since 18 U.S.C. § 4164 provides that such a prisoner "shall, upon release, be deemed as if released on parole . . . ," this situation is comparable to that of parole and no different emphasis can be placed upon it.

Hensley v. *Municipal Court*, 411 U.S. 345 (1973), a person subject to freedom under such conditions is considered "in custody" within the meaning of the federal habeas corpus statute. *Cochran* v. *United States*, 489 F.2d 691 (5th Cir. 1974).

Likewise, the period an alleged offender is free pending appeal under FED R. APP. P., Rule 9 is not to be credited against his ultimate sentence even though the bond is "highly restricted." *Polakoff* v. *United States*, 489 F.2d 727 (5th Cir. 1974).

Both the release on bail (18 U.S.C. §§ 3141-3152) and release pending appeal (FED. R. APP. P., Rule 9) provisions are silent as to the effect of the time spent during such periods upon the ultimate sentence. Like the recalcitrant witness statute, 18 U.S.C. § 3150 applies penalties (for failure to appear) and section 3151 provides additionally that "[n]othing in this chapter shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt." 18 U.S.C. § 3151. Despite their silence as to effect on other sentences, these provisions have been held to have no diminution effect on such other sentences.

We have already seen that under *Anderson* and *Zerbst*, *supra*, time spent for other federal offenses or time spent in state custody is not to be credited against the sentence for a federal offense. *See also Howard* v. *United States*, 420 F.2d 478 (5th Cir. 1970).

The only situation where credit has been given for the serving of time for a different offense is where a state prisoner has been denied release on bail solely because of an outstanding federal detainer lodged against him. In that case courts have held that he is in custody "in connection with" the federal offense and entitled to credit

against his federal sentence for time spent in state custody under those circumstances. *Davis* v. *Attorney General,* 425 F.2d 238 (5th Cir. 1970); *Brown* v. *United States,* 489 F.2d 1036 (8th Cir. 1974).

In view of the totality of authority, we conclude that despite the silence of 28 U.S.C. § 1826 (a) upon the subject, a prisoner serving a current federal sentence is not entitled to credit for time spent in custody for a civil contempt, unless, of course, the sentencing judge in the case of the contempt expressly makes the contempt confinement concurrent with the prior criminal sentence.[4]

We agree with Judge McGarr's observation that to permit petitioner to credit the contempt time against the criminal sentence would "remove the incentive . . . to compel the testimony sought" and render the statute nugatory when applied to a prisoner presently incarcerated.[5]

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[4] We further conclude that the result would be the same even in the absence of Judge Robson's May 1, 1974 order, wherein he expressly made the contempt sentence consecutive to the criminal sentence by ordering that the criminal sentence be suspended and held in abeyance while the petitioner is confined pursuant to the contempt order.

[5] Confinement for refusal to testify after the granting of immunity is "intended to operate in a prospective manner—to coerce, rather than punish. . . . While any imprisonment, of course, has punitive and deterrent effects, it must be viewed as remedial if the court conditions release upon the contemnor's willingness to testify." *Shillitani* v. *United States,* 384 U.S. 364, 370 (1966). Just as the prisoner procures his own escape or voluntarily violates probation or parole, he brings about his own confinement by his continued refusal to answer questions under immunity. He carries the keys for his release from confinement for civil contempt in his own pocket.

The other prayers in petitioner's application were dependent upon the crediting argument and fall with it. If credit is not to be given, as we here hold, the Bureau of Prisons' analysis of procedure to be followed as set forth in Policy Statement 7300.92 is correct.

The denial of the petition for a writ of habeas corpus is affirmed.

AFFIRMED

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit